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91-94

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DAVID A. LAMBERT,

PETITIONER,

-vs-

DEPARTMENT OF THE ARMY,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

David A. Lambert
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Pro Se Petitioner

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	2
LIST OF PARTIES	4
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	6
JURISDICTION	6
STATUTE INVOLVED	7
STATEMENT OF THE CASE	8
REASONS FOR GRANTING THE WRIT	11

I.

THE U.S. ARMY KNOWINGLY AND WILLFUL VIOLATED PETITIONER'S RIGHTS OF PRIVACY UNDER AMENDMENT IV OF THE CONSTITUTION OF THE UNITED STATES (GUARANTEE AGAINST UNREASONABLE SEARCHES AND SEIZURES) AND PETITIONER'S RIGHTS OF PROCEDURAL DUE PROCESS UNDER AMENDMENT V OF THE CONSTITUTION OF THE UNITED STATES, ALSO PETITIONER'S RIGHTS OF PRIVACY AND PROCEDURAL DUE PROCESS UNDER ARMY REGULATION (AR) 380-67,

AND PETITIONER'S RIGHTS OF PRIVACY
UNDER FEDERAL LAW 5 U.S.C. § 552
("THE PRIVACY ACT OF 1974") 11

II.

THE ARMY DID NOT MEET IT'S BURDEN
OF PROOF NECESSARY TO SHOW A
KNOWING AND WILLFUL OMISSION BY
PETITIONER OF HIS 1983 DLA
SUSPENSION IN ANSWER TO QUESTION
5d ON THEIR 29-R FORM 48

III.

THE U.S. ARMY'S ADVERSE ACTION
WAS TAKEN IN RETALIATION AGAINST
PETITIONER'S "WHISTLEBLOWING"
ACTIVITIES AND CONSTITUTES A
PROHIBITED PERSONNEL PRACTICE
UNDER 5 U.S.C. § 2302 62

CONCLUSION 68

APPENDIX A (Opinion and Order of the
Merit System Protection Board) .. 69

APPENDIX B (Judgement of the United
States Court of Appeals for the
Federal Circuit) 99

APPENDIX C (Amendment IV to the United

States Constitution; Amendment V to the United States Constitution; 5 U.S.C. § 552a (b); 5 U.S.C. § 2302 (b)8(a); Army Regulation 380-67 Chapter 2, paragraph 2-308; Army Regulation 380-67 Chapter 2, paragraph 2-400) 101

TABLE OF AUTHORITIES

Constitution of the United States

Fourth Amendment
(Unreasonable Searches
and Seizures) 11, 12, 31

Fifth Amendment
(Due Process of Law) 13, 14, 31, 62

Statutes

5 U.S.C. § 552a
(The Privacy Act
of 1974) 11, 14, 15, 23
31, 36, 38

5 U.S.C. § 1215
(The Whistleblowers
Protection Act of 1989) 51

5 U.S.C. § 2302 ..... 62, 63

Regulations

U.S. Army Regulation 380-67
(Personnel Security
Program) 11, 14, 16, 20, 31
33, 34, 35, 45

Defense Logistics Agency
Regulation 1406.1
(Maintaining Discipline) 51

Cases

Sullivan v. Department of the Navy,
720 F.2d 1266 (Fed. Cir.
1983) 47, 67

Nevels v. Hanlon,
656 F.2d 372 (8th Cir. 1981) 47

Raymond v. Department of the Army,
34 MSPR 478 (1987) 59

Waddell v. U.S. Postal Service,
31 MSPR 80 (1986) 59, 60

Warren v. Department of the Army,
804 F.2d 654 (Fed. Cir. 1986) 67

QUESTIONS PRESENTED

1. Whether Petitioner's Constitutional Rights to Privacy under Amendment IV of the Constitution of the United States were violated by the U.S. Army.

2. Whether Petitioner's Constitutional Rights of Procedural Due Process under Amendment V of the Constitution of the United States were violated by the U.S. Army.

3. Whether Petitioner's rights to privacy under Federal Law, 5 USC § 552a "The Privacy Act" of 1974, were violated by the U.S. Army.

4. Whether the U.S Army violated Petitioner's rights to privacy and procedural due process under Army Regulation (AR) 380-67 entitled "Personnel Security Program".

5. Whether the U.S. Army met it's burden of proof in showing Petitioner knowingly and willfully omitted a 1983 DLA suspension from his answer to question 5d on Army Form 29-R.

6. Whether the U.S. Army committed a prohibited personnel practice under 5 U.S.C. §

2302 by removing Petitioner for making protected disclosures as a "Whistleblower" of mismanagement, a gross waste of funds, or an abuse of authority.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner David A. Lambert and the Respondent the U.S. Department of the Army.

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

David A. Lambert,

Petitioner,

-vs-

Department of the Army,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The petitioner, David A. Lambert, respectfully prays that a writ of certiorari issue to review the judgement (no opinion accompanied the judgement) of the United States Court of Appeals for the Federal Circuit, entered in the above entitled proceeding on February 6, 1991.

OPINIONS BELOW

The opinion and order of the Merit Systems Protection Board entitled, David A. Lambert v. Department of the Army, case number 90-3383, docket number PH07528910212 and dated April 27, 1990.

The judgement (no opinion accompanied the judgement) of the United States Court of Appeals for the Federal Circuit entitled, David A. Lambert v. Department of the Army, case number PH07528910212 and dated February 6, 1991.

JURISDICTION

The Administrative Law Judge and the Merit System Protection Board derived their jurisdiction from 5 U.S.C § 7701.

The statutory basis for the United States Court of Appeals for the Federal Circuit to hear petitioner's appeal/petition for review is 5 U.S.C. § 7703 (a) (1).

The jurisdiction of this court to review the judgement of the United States Court of Appeals for the Federal Circuit is invoked under 28

U.S.C. § 1254 (1).

STATUTE INVOLVED

Constitutional Provisions

Fourth Amendment (Unreasonable Searches and Seizures). Pertinent text is in appendix.

Fifth Amendment (Due Process of Law). Pertinent text is in appendix.

Statutes

5 U.S.C. § 552a ("The Privacy Act of 1974") paragraph (b). Pertinent text is in appendix.

5 U.S.C. § 2302 (b) 8(a). Pertinent text is in appendix.

Regulations

U.S. Army Regulation (AR) 380-67 Chapter 2 paragraph 2-308. Pertinent text is in appendix.

U.S. Army Regulation (AR) 380-67 Chapter 2 paragraph 2-400. Pertinent text is in appendix.

STATEMENT OF THE CASE

This case is brought before The Supreme Court of the United States on appeal from a judgement, unaccompanied by a written opinion, issued by the United States Court of Appeals for the Federal Circuit on February 6, 1991.

On September 23, 1988, Petitioner's second line supervisor, Albert F. Biasotti issued to Petitioner, David A. Lambert, the first Notice of proposed Removal from his position as General Engineer, GS-12, in the Quality Assurance Directorate at Vint Hill Farms Station (Warrenton, Virginia). Mr. Lambert, through counsel, presented an oral and written reply on October 21, 1988 to the deciding official. At that time Mr. Lambert complained to the deciding official that the agency had locally suspended his security clearance two days earlier.

The first removal action was amended and a second Notice of Proposed Removal was issued on the November 22, 1988, under the pretext that further reasons justifying removal were

discovered as a result of meeting Mr. Lambert's October 21, 1988 request that he be given the already existent reasons for the local suspension of his security clearance on October 19, 1988. Mr. Lambert, through counsel, elected to provide a written reply but no oral reply to the second set of charges.

The deciding official (Mr. Schueble) removed Mr. Lambert from the civilian service on February 8, 1989 by a final Notice of Removal. Mr. Lambert filed a timely appeal to the Merit System Protection Board (MSPB), which designated an administrative law judge (ALJ) to hear the evidence.

On June 8 and 9, the ALJ took evidence and in a written initial decision filed on June 23, 1989 rejected three out of the five specifications asserted against Mr. Lambert. The ALJ sustained two of the five specifications as well as the penalty of removal.

On April 27, 1990 the full MSPB affirmed the ALJ's finding however in their written opinion

the board conclude that the ALJ had no basis for concluding that Mr. Lambert had actually received or attempted to receive any personal gain as a result of his June 10, 1988 phone call to Mr. Tim Jackson of Ultrasystems. However, the board conclude Mr. Lambert attempted to obtain a gain for Ultrasystems.

On September 18, 1990 petitioner, through counsel, filed a timely appeal of the full MSPB's decision with the United States Court of Appeals for the Federal Circuit.

On February 6, 1991 the United States Court of Appeals for the Federal Circuit issued a judgement, unaccompanied by a written opinion, affirming the decision of the MSPB.

REASONS FOR GRANTING THE WRIT

I.

THE U.S. ARMY KNOWINGLY AND WILLFULLY VIOLATED PETITIONER'S RIGHTS OF PRIVACY UNDER AMENDMENT IV OF THE CONSTITUTION OF THE UNITED STATES (GUARANTEE AGAINST UNREASONABLE SEARCHES AND SEIZURES) AND PETITIONER'S RIGHTS OF PROCEDURAL DUE PROCESS UNDER AMENDMENT V OF THE CONSTITUTION OF THE UNITED STATES, ALSO PETITIONER'S RIGHTS OF PRIVACY AND PROCEDURAL DUE PROCESS UNDER ARMY REGULATION (AR) 380-67, AND PETITIONER'S RIGHTS OF PRIVACY UNDER FEDERAL LAW 5 U.S.C. § 552a ("THE PRIVACY ACT OF 1974").

Introduction

Amendment IV of the Constitution of the United States says:

> "The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, **shall not be violated**, and no Warrants shall issue, but for reasonable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

In Thomas James Norton's book entitled "THE CONSTITUTION OF THE UNITED STATES ITS SOURCES AND ITS APPLICATION" used by Warrenton High School students (Warrenton, Virginia) where

Petitioner taught school for some period of time, Constitutional scholar James M. Cooley states:

> "The protection of the Constitution is not, however, confined to the dwelling-house, but it extends to one's person and papers, wherever they may be. It is justly assumed that every man may have secrets pertaining to his business, or his family or social relations, to which his books, papers, letters, or journals may bear testimony, but with which the public, or any individual of the public who may have controversies with him, can have no legitimate concern; and if they happen to be disgraceful to him, they are nevertheless his secrets, and are not without justifiable occasion to be exposed. Moreover, it is as easy to abuse a search for the purpose of destroying evidence that would aid an accused party, as it is for obtaining evidence that would injure him, and the citizen needs protection on the one ground as much as on the other".

United States Supreme Court Justice Louis D. Brandeis wrote in 1928 the right to privacy is:

> "the right to be let alone-the most prehensive of rights and the right most valued by civilized men."

Justice Brandeis was referring to the Fourth Amendment's guarantee against "illegal searches and seizures" by government.

Amendment V of The Constitution of the United States says:

> "No person shall be held to answer for a capital, or otherwise infamous crime, except in cases arising in the land or naval forces, or in the Militia, when in actual service in of War or public danger; nor shall any person be subject for same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law;**" (legal, judicial, and governmental fair play) "nor shall private property be taken for public use, without just compensation."

The issues of the U.S. Army's violation of Petitioner's Right's to Privacy guaranteed by Amendment IV and Petitioner's Right's of Procedural Due Process guaranteed by Amendment V, and the illegal evidence obtained by attorney/investigator Mr. Paschall, Ms. Kuhnlien, and others was clearly and extensively raised by Petitioner's attorney Mr. DiMuro at Petitioner's MSPB hearing (tr.pg.5 ln.17 thru tr.pg 18 ln.24 also tr.pg.23 ln.19 thru tr.pg.26 ln.25). Administrative Law Judge (ALJ) Mr. Butler, in no uncertain terms, instructed at the

MSPB hearing (tr.pg.22 ln.24 thru tr.pg.23 ln.6):

> "Ok, let me see if I can take some of these individually, and I'll start with the last one, the Privacy Act, the Constitutional violations. I'm sure you know -- if you don't, I'll tell you -- **that I'm not empowered to decide constitutional issues. THE BOARD** (referring to the MSPB) **doesn't do that. The presiding officials are administrative judges FOR THE BOARD. You can preserve that for further review if you think it's appropriate".**

These aforementioned Constitutional and Privacy Act arguments were preserved as instructed by the MSPB and presented in the appropriate forum in Petitioner's appeal to the U.S. Court of Appeals for the Federal Circuit. They were not rejected. Those Constitutional and Privacy Act arguments are now also appropriately being raised before The Supreme Court of the United States.

A. <u>In The Matter of the U.S. Army's Violation of Petitioner's Rights of Privacy and Procedural Due Process and Army Regulation (AR) 380-67 entitled "Personnel Security</u>

Program".

On March 19, 1987, prior to starting work at Vint Hill Farms Station Warrenton, Virginia, Petitioner executed Form DD 2221 "AUTHORITY FOR RELEASE OF INFORMATION AND RECORDS" as a prerequisite to obtaining his Top Secret security clearance. By the very terms printed on this form, Petitioner's authorization for release of information and records became null and void at the end of one year (midnight March 18, 1988). The illegal investigations, as shall be discussed in considerable length below, started long after March 18, 1988 in approximately the early July 1988 time frame and thereafter.

The U.S. Army's first attorney Mr. Paschall, who was subsequently directed by Administrative Law Judge (ALJ) Mr. Butler to remove himself as the U.S. Army's counsel because of his "deep involvement in the background of this case" (tr.pg.39 ln.8-12) and who ALJ Butler even viewed as "essentially an

investigator" (tr.pg.43 ln.9-12); claimed in testimony four (4) sentences out of AR 380-67 Chapter 9 gave him and Ms. Kuhnlien **separate** authority to conduct ad hoc investigations on Petitioner (tr.pg.87 ln.13-15; tr.pg.89 ln.1-25). Upon closely reading this **"General"** paragraph (9-100 which contains these four sentences) as well as those subparagraphs 9-101, 9-102, 9-103, and 9-104 which make up Chapter 9, it becomes absolutely clear that the U.S Army knowingly and willfully and with prejudice and malice has taken these sentences totally out of context. As shall be made abundantly clear; **in no way , shape, manner, or form do these sentences (TAKEN IN CONTEXT TO THE CHAPTER THEY ARE IN AS WELL AS WITHIN THE CONTEXT OF THE ENTIRE REGULATION) give Mr. Paschall, Ms. Kuhnlien or anybody else WHO IS UNAUTHORIZED separate authority to conduct ad hoc investigations.**

Those specific sentences within the **"General"** opening paragraph (9-100) which Mr.

Paschall cites as his authority to investigate read as follows:

> "Rather, there is the clear need to ensure that, **after the personnel security determination is reached**, the individual's trustworthiness is a matter of continuing assessment. The responsibility for such assessment must be shared by the **organizational commander or manager, the individual's supervisor** and, to a large degree **the individual himself**". Therefore, the heads of DOD components shall establish and maintain a program designed to evaluate on a continuing basis the status of personnel under their jurisdiction with respect to security eligibility. This program should ensure close coordination between security authorities and personnel, medical, legal, and supervisory personnel to ensure that all pertinent information available **within a command** is considered in the personnel security process".

Subparagraphs 9-101 (Management Responsibility), 9-102 (Supervisory Responsibility), 9-103 (Individual Responsibility), and 9-104 (Coworkers Responsibility) under 9-100 go on further to delineate, describe, and clarify just **exactly** what the responsibilities of the manager (in this case security manager Ms. Kuhnlien), the

individual's supervisor (in this case Mr. Biasotti), and the individual himself (in this case Petitioner) are with regard to evaluating on a continuing basis (**ie "continuing assessment"**) the status of personnel under their jurisdiction with respect to security eligibility. Absolutely **none** of these responsibilities (including those of the command security official Ms. Kuhnlien/security manager), under the very chapter that Mr. Paschall has cited as his and other's authority to conduct ad hoc investigations, include separate authority to conduct such.

Paragraph 9-101 (Management Responsibility) specifies that management's responsibilities relative to continuing assessment are:

> (1) "Initial indoctrination of personnel".
> (2) "Periodic instruction thereafter".
> (3) "The development of programs designed to counsel and assist employees in sensitive positions who are experiencing problems in their personal lives with respect to such areas as financial, medical or emotional

difficulties".

Paragraph 9-102 (Supervisory Responsibilities) specifies that the supervisor's responsibility relative to continuing assessment are:

(1) "To review an individuals DD Form 398 to ensure that no significant adverse information of which they are aware and that may have a bearing on subject's initial or continued eligibility for access to classified information is omitted".

(2) If the supervisor is not aware of any significant adverse information, then this is documented on the DD Form 398 with a specific statement, signed, and dated, and forwarded to the Defense Investigative Service (DIS).

(3) If the supervisor **is aware** of any significant adverse information, then this is documented on the DD Form 398 with a specific statement, signed, and dated, and **forwarded to DIS with the investigative package along with a written summary of the derogatory information.** The derogatory information is also reported to the local command security official (in this case Ms. Kuhnlien) for **"processing the investigative paperwork"** (note processing the investigative paperwork only **not investigating**).

(4) "If the derogatory information reported to the local command

security official (in this case Ms. Kuhnlien) seems to warrant adverse action, **the local command security official will immediately refer it to the Commander Central Clearance Facility (Fort Meade, Maryland) using DA Form 5248R".** Note refer not investigate.

(5) "If the local command security official determines that the information is minor and does not warrant an adverse action, the Personnel Security Investigation (PSI) request should **be forwarded to DIS.** A summary of the derogatory information **will be part of the investigative request packet. The DIS will initiate the investigation and expand as appropriate. DIS will forward results of the investigation to the Army Central Clearance Facility (CCF) at Fort Meade, Maryland for adjudication".**

Those authorized to conduct security investigations is explicitly specified in AR 380-67, Chapter 2 ("Policies"), Subsection IV entitled "Authorized Personnel Security Investigative Agencies", paragraph 2-400. It very clearly states:

> **"The DIS provides a single centrally directed personnel security investigative service to conduct personnel security investigations within the 50 states".** It goes on further to state: **"NO OTHER DOD component**

> **shall conduct personnel security investigations unless specifically authorized by the Deputy Under Secretary of Defense for Policy".**

No specific authorization by the Deputy Under Secretary of Defense for Policy has ever been produced by the U.S. Army bestowing upon Mr. Paschall, Ms. Kuhnlien, and other government officials the authority to conduct independent investigations.

Subparagraph 2-401 under the "General" paragraph 2-400, specifically states those type of allegations DIS has jurisdiction over investigating:

> (1) **"Disregard of public law, statutes, Executive orders, or regulations, including violation of security regulations and practices".** This is what the U.S. Army claims Petitioner is guilty of isn't it?
> (2) **"Acts of omission or commission that indicate poor judgement, unreliability or untrustworthiness".**
> (3) **"Any knowing and willful falsification, coverup, concealment, misrepresentation, or omission of a material fact from any written or oral statement, document, form or other representation or device used by the Department of Defense or any**

> **other Federal agency**". This is also what the U.S. Army claims Petitioner is guilty of isn't it?

Chapter 2 subparagraph 2-402c. entitled "Postadjudication Investigation" (obviously this subparagraph applies to Petitioner since he had already been granted a Top Secret clearance by the U.S. Army Central Clearance Facility at Fort Meade, Maryland; Petitioner was granted his Top Secret SI security clearance July 7, 1988 and it was **locally suspended** on October 19, 1988 by Ms. Kuhnlien due to derogatory suitability allegations) states:

> "Derogatory suitability allegations, except those covered by d, below (which refer to allegations of criminal activity) arising **subsequent** to clearance requiring investigation to resolve and to determine the individual's eligibility for continued access to classified information, reinstatement of clearance/access, or retention in a sensitive position **shall be referred to the DIS to conduct" (not the local command security official/security manager - Ms. Kuhnlien or Mr. Paschall to conduct) "a special investigative inquiry (SII)."**

Chapter 2 subparagraph 2-308 cautions

that:

> "The subject of a personnel security investigation is the best source of accurate and relevant information concerning the matters under consideration". **Further "restrictions imposed by the PRIVACY ACT Of 1974 DICTATE" (I REPEAT DICTATE) "that Federal Investigative Agencies collect information to the greatest extent practicable directly from the subject".**

Chapter 2 subparagraph 2-502 entitled "Collection of Investigative Data" reiterates that:

> "To the greatest extent practicable information relevant to security determinations **shall be obtained directly from the subject of a personnel security investigation".**

The facts are that attorney/investigative agent Mr. Paschall never once talked to Petitioner to get his side of the story on any of the charges contained in the initial or amended removal actions before their issuance (tr.pg.61 ln.12-25). Further at Petitioner's October 21, 1988 oral reply Mr. Scheuble, the Deciding Official, did not even direct Mr.

Paschall to conduct investigations; **only to fulfill the request Petitioner made at his oral reply to be provided the reason or reasons (which were obviously already available) why his clearance had been locally suspended by Ms. Kuhnlien two days earlier on October 19, 1988** (tr.pg.74 ln.21-25 also tr.pg.66 ln.1-25).

In fact attorney/investigator Mr. Paschall did not even talk to Mr. Hettman before the first removal action was issued to Petitioner on September 23, 1988 (tr.pg.55 ln.22-24) or to Mr. Jackson of Ultrasystems (Petitioner's primary accuser) until two months before Petitioner's June 8-9, 1989 MSPB hearing, (tr.pg.66 ln.3-9) which was almost one year after Petitioner's offending phone call (June 10, 1988). Petitioner had been very critical of both Mr. Hettman and Mr. Jackson and attorney/ investigator Mr. Paschall knew it. Because of Mr. Paschall's dilatory conduct by the time he did get around to talking with Mr. Jackson ALMOST A YEAR LATER, Mr. Jackson's testimony

had unquestionably become a **fait accompli**. It is very important to point out that the narrative on **EVERY** document Mr. Jackson either initialed or signed had been carefully crafted by either Mr. Hettman (Project Leader) or Mr. Trimbur (Contracting Officer), both of which Petitioner had been very critical of. Further, in no two documents was the narrative the same and in fact two of the documents had been substantively and substantially altered. Lastly the manufacturing of the evidence to support the Ultrasystems charge was accomplished by messengers Mr. Hettman and Mr. Trimbur. The evidence they were able to muster was then fed to Mr. Paschall in the Vint Hill legal office who was obviously controlling and directing the course of this purported "investigation".

In fact Mr. Paschall admitted he knew in August 1988 that Petitioner had been very critical of both Ultrasystem's and the government's performance on the contract (tr.pg.63 ln 25 and tr.pg. ln.1-5).

In fact Mr. Paschall specifically knew in August of 1988 that Petitioner had been very critical of Mr. Hettman by virtue of the fact that he admitted he read Petitioner's June 30, 1988 Memorandum for Record (MFR) in which Mr. Hettman and Mr. Jackson were discussed (tr.pg.65 ln.1-5).

In fact Mr. Paschall, as an attorney and an officer of the court, knew from the very beginning the investigations he was conducting or was assisting others in conducting were absolutely illegal and totally unauthorized:

(reference tr.pg.91 ln.18 thru tr.pg.92 ln.16):

Ques-"I would like to direct your attention, sir, to Exhibit O-10, part of the supplemental set for the ALJ--O-10. Do you recognize that as the AUTHORITY FOR RELEASE OF INFORMATION?"
Ans- "Yes."
Ques-"Do you see the date March 19, 1987?"
Ans- "Yes."
Ques-"Signed by Mr. Lambert?"
Ans- "Yes."
Ques-"And this was in accordance with his request for security clearance when he first came to Vint Hill?"
Ans- "Yes."
Ques-"All right. It says by its terms that this authorization is valid for one

year after his signing. Do you see that?"

Ans- "Yes."

Ques-"Do you know of any documents thereafter renewing that authorization?"

Ans- "I'm sorry sir, but I think you failed to interpret the regulations correct."

Ques-"Mr. Paschall, Capt. Patterson and the Board can tell me how stupid I am. Is there a written document that you know of extending this authority signed by Mr. Lambert?"

Ans- "**NO, THERE IS NOT.**"

Mr. Paschall, Ms. Kuhnlien, and other government officials contemptuously disregarded Petitioner's rights under the Constitution, Federal Law, and their own regulations and then had the arrogance to declare what they did legal. Mr. Paschall's "**investigation**" was a sham and his, Ms. Kuhnlien's, and other government official's conduct as bizarre as something one might read in a Franz Kafka novel. In reality this investigative team (and Mr. Paschall even emphasizes it was a "TEAM" effort in his testimony; trial transcript pg.97 ln.21 & pg.98 ln.12) was nothing less than a self appointed, amateurish, one sided, blatantly prejudicial,

illegally established, hit squad, intent on only one thing; getting rid of the Petitioner, WHAT EVER IT TOOK; for "Blowing the Whistle" on the disgracefully mismanaged Ultrasystem's (along with making other protected disclosures according to the ALJ himself) contract to the tune of an estimated $5,500,000 of taxpayer's money figuratively thrown down a rat hole and the threat of the government having to pay Ultrasystems the remaining $6,600,000 of their $12,100,000 contract for missing every schedule they ever presented and providing the government no hardware (Maintenance Trainers) whatsoever. (Ultrasystems has recently sued the U.S. Army for approximately $15,000,000 in the Armed Services Board of Contracts Appeals forum claiming the Army aided and abetted the situation)

Of all the people in the world it is absolutely incredible and almost unbelievable that attorney/investigator Mr. Paschall (whose profession obviously is the Law) should exhibit

such little knowledge about the presumptions of innocence and the minimum requirements of procedural due process and just plain fundamental fairness (in fact the ALJ even stated that some of these tactics the U.S. Army used were "FUNDAMENTALLY UNFAIR" - reference tr.pg.4 ln. 17-19) and fairplay by: absolutely refusing to interview Petitioner or those individuals (Mr. Hettman and Mr. Jackson) who Mr. Paschall knew Petitioner had been extremely critical of and who initiated the removal process to begin with. Recall that Mr. Hettman **initiated a phone call to Mr. Jackson** practically instantaneously after receiving Petitioner's June 30, 1988 MFR, which was very critical of him. In fact Petitioner's MFR so angered Mr. Hettman that he prepared his own MFR rebutting line by line Petitioner's MFR and then withheld it from evidence until divulging it's existence during his deposition at Mr. DiMuro's office (tr.pg.9 ln.9-19). Mr. Hettman allegedly memorialized the phone call he had

initiated to Mr. Jackson and then sent a copy of that memorialization to the government contracting officer Mr. Trimbur (who Petitioner had also been very critical of in his June 30, 1988 MFR) who in-turn sent a memo to Mr. Biasotti (Petitioner's supervisor/the proposing official) demanding he do something about Petitioner. With Mr. Hettman's alleged memorialization the process of constructing Petitioner's initial removal action had begun.

What kind of possible impartial, unbiased investigation could be done if Petitioner's side of the story is not known? There is only one explanation for this outrageously prejudicial conduct and that is that Mr. Paschall and other agency officials had made the prior determination (**before Petitioner's oral/written reply on October 21, 1988**) that because we believe the accusers, it is totally unnecessary to speak to the accused. This attitude of I don't care what Petitioner's side of the story is just build me a good enough case to get rid

of him, is rather revealing with respect to the agency's motives from the very beginning and they certainly had nothing to do with protecting Petitioner's Constitutional rights of Privacy, affording fundamental Due Process and fairness, obeying Federal Law, abiding by their own regulations, or even getting to the truth of any of these matters. The U.S. Army's contemptuous disregard for Petitioner's rights is no better exemplified than by the proposing and deciding official's own testimony:

(1) Mr. Biasotti's testimony:
(tr.pg.207 ln.18 to pg.208 ln.5)

ALJ- "I think we went through the scenario over a period of months and reviewed what happened from your perspective in your testimony. And you testified that you thought the disclosures made to you by Trimbur were significant and should be looked into, but you never talked to Lambert and you never talked to Jackson. Is that right?"

Ans- "That is correct."

ALJ- "And you **didn't have the benefit of the Jackson statement prior to the time you initiated the letter of proposed removal**?"

Ans- "I believe that I said that, yes."

ALJ- "That's your testimony?"

Ans- "Yes."

(2) Mr. Scheuble's testimony:
(tr. pg.230 ln.6-19 & pg.244 ln.12 to

pg.245 ln.5)

Ques-"And you did not ask Mr. Lambert to explain in writing or orally the Lambert/Jackson phone call outside of the formal adverse action oral reply? Isn't that true?"

Ans- "That is correct."

Ques-"And did you ask Mr. Biasotti if he had ever asked while this whole thing was brewing whether or not he had asked Mr. Lambert for his version of the facts?"

Ans- "Not directly, no."

Ques-"Do you mean indirectly somehow?"

Ans- "I--based on the **three or four status sessions** or meetings that **we** had" (in reality these were nothing less than illegal ex parte contacts), "I **assumed** that from some of the comments that were made, that Mr. Lambert and Mr. Biasotti had had that discussion."

Ques-"You have never seen anything in writing, writings of any sort, that would pertain to such a discussion, have you? A Biasotti/Lambert discussion of the Jackson/Lambert phone call?"

Ans- "Not that I recall, no"

ALSO

ALJ- "I think you said in your testimony that you were under the impression that Mr. Biasotti had talked to Mr. Lambert"

Ans- "Yes."

ALJ- "about the telephone call?"

Ans- "Yes."

ALJ- "The fact is that Mr. Biasotti has testified that he did not talk to Mr. Lambert and that he did not talk Mr. Jackson. Were you aware of that?"

Ans- "No, I was not. As I said, I assumed that he had."

ALJ- "But you didn't question him on whether he--"

Ans- "No, I did not."

ALJ- "had dug into the matter or investigated it **by going to the participants** in this telephone conversation; violated the agency's regulations and caused Mr. Lambert's removal?"

Ans- "No, I did not go beyond that. I did not--**I stayed back and used all the information that was being provided to me**".

Obviously Mr. Scheuble is referring to the information being provided to him by, at the very least, investigators Mr. Paschall and Ms. Kuhnlien.

To further substantiate the fact that (AR 380-67) does not bestow upon the local command security official/security manager the power to conduct independent investigations there is the testimony of the previous local command security official/security manager, Captain Orren Mills. Captain Mills occupied that position until he left Vint Hill and Ms. Kuhnlien was promoted into his job. Captain Mills is also the individual who conducted the security interview on Petitioner in the presence of Petitioner's attorney Ms. Slavet. Captain Mill's testimony

shows that he was acutely aware of precisely the limits of authority of the local command security official/security manager. He states that that office's job **"was not to make any independent inquires"**. He further states that the only person his office talks to is the **"individual himself"**. He also states that **"it was the DIS's charter to do investigations"** (depo.pg.30 ln.5-23 & pg. 31 ln.1-14). Additionally Captain Mills states that his office **"never sought driving records, medical records, witness statements, character statements, or any other category of document such as this"** (depo.pg.38 ln.9-12). All information was taken in **"from the individual"**, sent to the Army CCF at Fort Meade, Md., and they would then engage the DIS to conduct the investigation. Captain Mill's modus operandi is **exactly** consistent with the law and the AR (AR 380-67) governing his manner of operation. However, it is totally inconsistent with Mr. Paschall's and Ms. Kuhnlien's manner of

operation.

In fact Appendix C-7 to AR 380-67 entitled "Additional Investigation to Resolve Derogatory or Adverse Information" states:

(1) "Requests for additional investigation required to resolve derogatory or adverse information shall be submitted by DD Form 1879 (Request for Personnel Security Investigation) to: Defense Investigative Service, P.O. Box 454, Baltimore, MD 21203. Such requests shall set forth the basis for the **additional** investigation and **describe the specific matter to be substantiated or disproved.**"

(2) "The request should be accompanied by an original and four copies of the DD Form 398 (Statement of Personnel History) when appropriate, two copies of DD Form FD-258 (Fingerprint Card) **and an original copy of DD Form 2221 (Authority for Release of Information and Records)**, unless such documentation was submitted within the last 12 months" **(with regard to Petitioner the documentation <u>was not</u> submitted within the last 12 months)** "to DIS as part of a NAC or other personnel security investigation".

In fact Appendix I-12 paragraph b.(2) of AR 380-67 indicates that the investigative forms including "RELEASE FORMS" (obviously this includes the DD Form 2221 entitled "Authority for Release of Information") once provided by

the individual under investigation are used for the purpose of **legally** obtaining (as opposed to illegally obtaining) information from:

(1) "Medical Institutions"
(2) "Medical Agencies"
(3) "Personal Physicians"
(4) "Therapists"
(5) "Psychologists"
(6) "Psychiatrists"
(7) "Counselors"
(8) "Rehabilitative Treatment Agencies"
(9) "Rehabilitative Treatment Personnel"
(10) "Police"
(11) "Criminal Agencies"
(12) "Probation Agencies"
(13) "Probation Officers"
(14) "Financial Institutions"
(15) **"Employers"** (obviously ERI and beyond)
(16) **"Federal Agencies"** (DLA, DIS, etc.)
(17) **"State Agencies"** (Va. DMV, Police, etc)
(18) "Professional Associations"
(19) **"Any Other Organizations"** (Ultrasystems)

B. <u>In the Matter of the U.S. Army's Violation of Petitioner's Rights of Privacy and Procedural Due Process Under Federal Law 5 USC § 552a, "The Privacy Act of 1974"</u>.

Federal Law 5 USC § 552a, "The Privacy Act of 1974" paragraph (b) in pertinent part states:

"No agency shall disclose any record which is contained in a system of records by **any** means of communication to any person, or to another agency, **except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains**".

Those illegal investigations performed are

as follows:

(1) **The Ultrasystems Investigation:** (Reference tr.pg.57 ln.24-25 and pg.58 ln.1-15): In which investigator Mr. Paschall advises Mr. Trimbur to obtain a sworn statement from Mr. Jackson and then to instruct Mr. Jackson to send it to the Vint Hill Legal Office. According to Jackson's testimony (tr.pg.396 ln.4-9) he received the sworn statement in the mail which had been written for him by the government contracting officer, Mr. Trimbur, who asked him to sign it. During the same time Mr. Trimbur was soliciting Mr. Jackson's signature on the sworn statement he had prepared for him, Ultrasystems was experiencing large schedule slippages in their contract with the government and needing every break they could get. It is important to understand the actual context

(relative to 5 USC § 552a) in which the solicitation of Mr. Jackson's signature was made and it is as follows: Mr. Trimbur calls Mr. Jackson allegedly to go over Mr. Hettman's interpretations of Mr. Jackson's conclusions of the June 10, 1988 phone conversation he had with Petitioner. According to Mr. Jackson's own testimony in that phone call (reference tr.pg.419 ln. 21-24), **MR. TRIMBUR MAKES STATEMENTS TO HIM ABOUT "OTHER THINGS THAT HAD HAPPENED WITH MR. LAMBERT" AT VINT HILL**. According to Mr. Trimbur's own August 2, 1988 memo, **MR. JACKSON IN THAT PHONE CALL ASKED HIM IF MR. LAMBERT WAS GOING TO BE REMOVED FROM THIS CONTRACT**. Mr. Trimbur then drafts his interpretations of Mr. Jackson's conclusions (as opposed to Mr. Jackson's actual words since Mr. Jackson testified he did not make any contemporaneous notes of the

Lambert/Jackson phone call) of the telephone call he had with Petitioner nearly two months before. Mr. Trimbur sends a copy of his August 2, 1988 memo to Mr. Biasotti. Mr. Trimbur also sends a note to Mr. Biasotti demanding he do something about Petitioner. Mr. Trimbur's triple hearsay "**ONE STEP ABOVE USELESS**" (according to ALJ Mr. Butler's own definition of hearsay evidence found on page 42 lines 20-21 of the hearing transcript) August 2, 1988 concoction **WAS THE SOLE BASIS RELIED UPON BY MR. BIASOTTI TO SUSTAIN THE ULTRASYSTEMS CHARGE AND TO ISSUE PETITIONER THE FIRST REMOVAL ACTION**. In addition to Mr. Biasotti's own testimony above, the fact that Mr. Trimbur's August 2, 1988 provided the sole basis for the Ultrasystems charge and first removal action is corroborated **THREE** other places in the

record (appellant's trial exhibits K-9 and N-13 as well as Petitioner's Motion of June 7, 1989 for Sanctions and to Strike the Agency's Charges page 5 note 2. In fact, **referring specifically to the "bootstrapped" substantively altered version** of Mr. Trimbur's August 2, 1988 memo solicited by him from Mr. Jackson some six weeks later Civilian Personnel Assistant Ms. Greguras emphatically states in exhibit N-13: "**THE GOVERNMENT DID NOT INCLUDE THIS DOCUMENT AS A BASIS TO SUPPORT THE REMOVAL ACTION**". **This modus operandi of ISSUING a removal action on, at best triple hearsay, "ONE STEP ABOVE USELESS", uninvestigated by an impartial unbiased third party (ie the DIS), totally unsubstantiated grounds, THEN AFTER IT'S ISSUANCE manufacturing evidence to fit the ·action;** is unconscionable and despicable and

violates any standards of human decency and fairness, additionally it indisputably demonstrates a complete and conscious disregard for even the minimum standards of due process and undermines the Constitutional principles upon which our nation is based. As it turns out Mr. Trimbur is not the only person that has employed this technique of manufacturing "bootstrap evidence". Mr. Biasotti is an old hand at this also. According to Mr. Coopers own testimony (tr.pg. 299 ln. 20-25 and tr.pg.300 ln. 1-4) Mr. Biasotti asked him on July 5, 1988 to write a memo about "**PROBLEMS**" with Petitioner's performance over a year before. Mr. Cooper asked Mr. Biasotti why he wanted him to manufacture something that heretofore he felt was so minuscule and he had regarded as nothing more than a

personality conflict. Mr. Biasotti told Mr. Cooper that **HE NEEDED IT BECAUSE "THERE WERE ACTIONS ONGOING AGAINST HIM" (Mr. Biasotti)**.

(2) **The Defense Logistics Agency Investigation (DLA):**

(reference tr.pg.92 ln.17-25 and pg.93 ln.1-23): In which investigator Mr. Paschall testifies that co-investigator Ms. Rehling (Director of Personnel) initially called Mr. Kozin in Philadelphia, Pennsylvania at the DLA to obtain information on Petitioner's 1983 DLA suspension. Mr. Paschall then followed up Ms. Rehling's phone call with his own phone call to Mr. Kozin and specifically asked Mr. Kozin to give him a sworn statement and also send him **"whatever information he had on"** on the 1983 suspension.

(3) **The State of Virginia Department of Motor Vehicles Investigation:**

(reference tr.pg.473 ln.16-19 and pg.475 ln.4-13): In which investigators Mr. Paschall and Ms. Kuhnlien accessed thru the base Provost Marshal's Office Petitioner's Virginia driving record and arrest record. It is important to note that even the State of Virginia recognizes and respects individual's Rights to Privacy in that several months ago Petitioner went to the local DMV office in Warrenton, Virginia to obtain a copy of his driving record for his files and before the clerk would provide Petitioner a copy of his own record he was required to prove his identity.

(4) **The ERI Investigation (immediate previous employer):**

(reference tr.pg.473 ln.13-15 also tr. pg.77 ln.13 thru tr.pg.84 ln.18): In which Ms. Kuhnlien testifies that Mr. Paschall suggested to her they conduct

the ERI investigation. In which investigator Paschall calls Mr. Hayes, president of ERI, (ERI was a consulting engineering firm who had substantial government contracts with the U.S. Army at Vint Hill) and asks him to provide a statement about Petitioner. Mr. Paschall also calls Mr. Kelly of ERI for the specific purpose of obtaining whatever information he had, or could obtain from other ERI sources, on Petitioner. Mr. Paschall and co-investigator Ms. Kuhlien go to the ERI trailer to meet with Mr. Kelly and get from him all internal ERI records he had been able to muster.

(5) **The Investigation of Previous Employers Beyond ERI (DLA, AAI Corp., Reflectone, US AEC, etc.)**: (reference tr.pg.113 ln.2 thru pg.115 ln. 24 also tr.pg.479 ln.6 thru pg.483 ln.25): In which, as bizarre as it might sound, investigator's Mr. Paschall and Ms. Kuhnlien testified at

> Petitioner's MSPB hearing (June 8-9, 1989) that "even to this day" (**four months after Petitioner left the government on February 8, 1989**) they were continuing to conduct investigations on Petitioner and site AR 380-67 paragraph 9-100 "continuing assessment" as their authorization. This paragraph, as has been shown above, nor any other part of AR 380-67 gives authorization to conduct these surreptitious ad hoc investigations on people that don't even work for the government and then further bestows the authority to conduct these investigations on persons who are not even authorized to do so.

Additionally trial testimony (reference tr.pg. 59 ln.1-11, tr.pg.61 ln. 16-25, and tr.pg.67 ln.1 thru pg.71 ln.11) shows that Mr. Paschall and Mr. Biasotti (both alone and together) met with Mr. Scheuble on a number of

occasions. The evidence further shows that Mr. Paschall met constantly with both of them in his role as both counsel and an independent investigator (in fact as shown earlier the ALJ even looked upon Mr. Paschall as "essentially an investigator" and in fact had him disqualify himself (but not without Mr. Paschall's vigorous opposition) as counsel representing the government because of his **"deep involvement in the background of this case"**). Mr. Paschall's independent investigation of Petitioner was nothing less than self-appointed head-hunting mission in which he sought out evidence, ALTERED EVIDENCE (reference the alteration of Mr. Cooper's original statement tr.pg.301 ln.16-23; tr.pg.302 ln.11-18; tr.pg.303 ln.11-18; tr.pg.303 ln.23-25; tr.pg.304 ln.1-15), and presented evidence against Petitioner as an investigator for the U.S. Army. As an advocate of his own defense, Mr. Paschall clearly took on the role of a proponent of an adverse action -- a role which is incompatible with his role of

legal advisor. Further Mr. Biasotti's efforts to clarify the issues to Mr. Scheuble in meetings where Petitioner was not present violates his rights. The meetings held by these persons with Mr. Scheuble meet the elements of Sullivan v. Department of the Navy, 720 F.2d 1266 (Fed. Cir. 1983) and Nevels v. Hanlon, 656 F.2d 372 (8th Cir. 1981) in that contacts were made by an adversary clearly with the purpose to pressure a decision resulting in harm to Petitioner.

Petitioner does not make the aforementioned charges merely to whine into the record they are extremely serious issues and cut right to the heart of our Constitutional form of government. They represent the absolute grossest form of willful and knowing disregard for an individual's rights of privacy and due process under the Constitution of the United States, Federal Law, and the U.S. Army's own regulations. In fact in Sullivan v. Department of the Navy, 720 F.2d 1266 (Fed. Cir. 1983), the ex parte contacts was not framed as a

prohibitive personnel practice. It was framed as a constitutional violation **which overrides all of the other issues** and resulted in dismissal of the charges. As in Sullivan v. Department of the Navy, there is only one remedy in Petitioner's case and that must be dismissal of all charges for willfully violating Petitioner's privacy and procedural due process rights constituting harmful error. In addition all evidence obtained in violation of Petitioner's right's under the Constitution, Federal Law, and the agency's own regulations must be stricken from the record.

II.

THE ARMY DID NOT MEET IT'S BURDEN OF PROOF NECESSARY TO SHOW A KNOWING AND WILLFUL OMISSION BY PETITIONER OF HIS 1983 DLA SUSPENSION IN ANSWER TO QUESTION 5d ON THEIR FORM 29-R.

Introduction

The specific question under which the U.S. Army claims Petitioner should have listed the 1983 DLA suspension asks: "Have you ever

received any written reprimands or unsatisfactory efficiency reports?"

In order for Petitioner to be in violation of the certification that he signed up to on the form itself, the Army must prove that an omission is KNOWING AND WILLFUL.

The U.S. Army's burden of proof is two fold, FIRST they must prove that the question AS WRITTEN provided Petitioner CLEAR, EFFECTIVE, AND SUFFICIENT NOTICE that Petitioner was to list a prior civil service suspension and SECOND they must prove that Petitioner knowingly and willfully omitted the information. It is entirely insufficient to prove one or the other. Both must be proven and the U.S. Army in Petitioner's case proved neither.

A. In the matter that question 5d on the U.S. Army's Form 29-R failed to provide Petitioner clear, effective, and sufficient notice that Petitioner was to list a prior 1983 civil service suspension.

The question as written is vague and

ambiguous and positively does not provide Petitioner **clear, effective, and sufficient notice** that Petitioner was to list the prior 1983 DLA suspension.

(1) Even though the question has multiple subparts which explore various types of past investigations, prosecutions, and arrests, etc.; it does not ask the respondent to list suspensions, **NOR DOES IT PROVIDE ANY OTHER CLARIFYING OR QUALIFYING INFORMATION SUCH AS: UNDER REPRIMANDS RESPONDENT IS TO DELINEATE ALL OTHER "ADVERSE ACTIONS" INCLUDING SUSPENSIONS, REDUCTIONS IN PAY, REDUCTIONS IN GRADE, ETC.**

(2) Further the government, Federal Law, and yes even the proposing official himself, Mr. Biasotti, distinguishes between reprimands and suspensions and treats them as separate and distinct concepts. "The Federal Personnel Manual" (FPM) distinguishes between them. The "Table

of Penalties" distinguishes between them. Federal Law 5 USC § 1215 ("The Whistleblowers Protection Act of 1989") under Disciplinary Action paragraph (a)(3) distinguishes between them. The very regulation (DLA Regulation Number 1406.1 entitled "Maintaining Discipline") governing discipline from the DLA, which was the agency Petitioner worked for when he received the suspension, distinguishes between reprimands and suspensions. Mr. Biasotti, the Proposing Official, in his discussions of the Federal Personnel Manual in TWO separate letters (dated October 17, 1988) to Petitioner's attorney Mr. DiMuro dealing with Petitioner's grievances 0001 and 0002; distinguishes and discuses reprimands and suspensions as separate and distinct concepts.

(3) The explanation for the vague and

ambiguous nature of the form is undoubtedly that the personnel at Vint Hill who constructed it were either not trained or poorly trained to do so. Captain Orren Mills' (former local command security official/security manager) testimony provides some insight as to the origin of the version of the form Vint Hill was using (deposition pg.26 ln.22-23 also pg.27 ln.1-4). Captain Mills states that the form **"WAS A LOCAL VINT HILL FORM, AND IT WAS PLAGIARIZED BY MY PREDECESSOR OFF OF THE INSCOM FORM THAT THEY USED AT ARLINGTON HALL STATION AND VARIOUS OTHER INSTALLATIONS IN THE ARMY."** No evidence was presented that would give any indication who actually developed the Vint Hill version, their expertise in development of forms of this nature, or if they had any knowledge or training at all in the security area. For that

matter the INSCOM form, from which the Vint Hill version was derived according to Captain Mills, may have made more sense and been less ambiguous; in fact may have even asked respondent to list suspensions. The point really is that Petitioner was required to respond to the words before him, and Petitioner did so; honestly, extremely extensively, with full and complete candor, and without any conscious attempt to deceive. Petitioner should not be penalized or required to apply clairvoyance because of the irrational, illogical, unclear, and ambiguous manner in which the form was constructed by people at Vint Hill.

(4) The bottom line is very very simple; it is not Petitioner's job (as an applicant) to evaluate the logic of the government's form or to gauge or try to second guess the intent of the form's

author, **only to answer the questions as concisely as possible based on the language appearing on the form**, which Petitioner unquestionably did (in approximately **FIVE** computer generated pages of answers).

B. **In the matter that Petitioner did not knowingly and willfully omit the 1983 DLA suspension from his answer to question 5d on U.S. Army Form 29-R.**

The U.S. Army, in their Response (August 21, 1989) to Petitioner's Petition for Review (July 31, 1989) to the MSPB, concocted the argument for the record that Petitioner felt no obligation to disclose his 1983 DLA suspension based on his knowledge that the Army already had these records or had access to them. This fabrication and distortion of Petitioner's intent is not supported by reading Petitioner's Petition for Review (July 31, 1989) or the evidence. The U.S. Army further asserts for the record, in their August 21, 1989 Response, that

the 29-R form was not directed at someone with prior government service. While that may well be true, that is also not the issue; the issue is whether Petitioner **intentionally provide a false response to the question AS WRITTEN.** It is positively clear from Petitioner's Petition for Review (July 31,1989) that the only purpose in discussing the omission of the 1983 DLA suspension, **RELATIVE TO PRIOR GOVERNMENT SERVICE**, (ie US AEC and DLA) was to provide his explanation as to why he thought the information was not required and also to show why, WITH HIS PAST GOVERNMENT EXPERIENCE, it is implausible that he would consciously decide to attempt to conceal information that he knew the Army already had or had access to. Irrespective of the fact that other entities and/or companies may or may not distinguish between reprimands and suspensions; the point is THAT BASED UPON PETITIONER'S PRIOR GOVERNMENT SERVICE HE KNEW THAT THE GOVERNMENT DISTINGUISHED BETWEEN REPRIMANDS AND SUSPENSIONS, and since all

Petitioner had to go by were the government's words on the government's form, and since the government on their form did not ask respondent to list suspensions nor did it give any clarifying or qualifying information with respect to this question, Petitioner thought it was not necessary to list the 1983 DLA suspension. In fact Ms. Slavet's (who was the attorney who was representing Petitioner and was present at his initial security interview with Captain Orren Mills) testimony (tr.pg. 496 ln. 1-3) was: Question- "Did he (referring to Captain Orren Mills) expand upon the definition of reprimand to include anything besides reprimand?"; Answer- "No, he (referring to Captain Mills again) did not."

Petitioner's only reason for listing an October 1986 letter from ERI's Mr. Denzler in response to this question was because Petitioner was unaware of any ERI distinction and in the absence of another title, **UNLIKE THE 1983 SUSPENSION**, to be safe Petitioner considered it

a reprimand (which the question asked for) and listed it (reference attorney Ms. Slavet's testimony tr.pg.501 ln.1-6: "I remember, with regard to 5d he (Petitioner) was bending over backwards. If there was any question, it was whether the memo from Densler constituted a reprimand or not because it wasn't clear. I don't know whether that constituted a reprimand, but the advice was, to be safe, you put that in because you don't want that to be a problem."). Attorney Ms. Slavet further testifies (reference tr.pg.502 ln.6-8) "I certainly don't think that that question (referring to question 5d on Form 29-R) put him (referring to Petitioner) on notice as to what was being asked for was suspensions. The question didn't say "suspension".

The agency on page 16 of their Response (Aug. 21, 1989) to Petitioner's Petition for Review (Jul. 31, 1989) states: **THE SPECIAL MEANING** GIVEN THE TERM REPRIMAND BY FEDERAL MANAGEMENT AND CIVILIAN PERSONNEL STAFF, **DOES**

NOT APPLY TO DEFINE REPRIMAND EMPLOYED IN THE SECURITY FORM QUESTION.------RATHER, THE GENERAL DICTIONARY DEFINITION GOVERNS". At no time **BEFORE** Petitioner was to provide an answer to 5d was he given clear, effective, and sufficient notice (on the form or otherwise) that:

(1) In answering this question he should disregard the meaning given the term in in the FPM.

(2) The "GENERAL DICTIONARY DEFINITION GOVERNS" and further that this definition supersedes the meaning as found in the FPM.

(3) Webster's dictionary was considered to be the authoritative source for definition of terms.

I mean, we are talking here about the alleged willful omission of a FEDERAL PERSONNEL ACTION and certain FEDERAL REGULATIONS governing such actions (ie THE FEDERAL PERSONNEL MANUAL) yet the U.S. Army absurdly contends that for the purpose of question 5d Petitioner (AS A FORMER

FEDERAL EMPLOYEE, APPLYING FOR A FEDERAL JOB, AND WHO KNEW THE GOVERNMENT DISTINGUISHED BETWEEN REPRIMANDS AND SUSPENSIONS) should have used clairvoyance to determine the U.S. Army's stealth instructions that applied to this question and should have totally blotted out of his mind the meaning given the term in the very regulation governing such personnel actions.

In the U.S. Army's Response (Aug. 21, 1989) to Petioner's Petition for Review (Jul. 31. 1989) they argue that Petitioner is an individual "WHO KNEW OR SHOULD HAVE KNOWN THAT THE QUESTION WITHIN IT'S CONTEXT INQUIRED OF THE APPELLANTS PRIOR "GENERAL MISCONDUCT". This knew or should have known argument in the U.S. Army's August 21, 1989 Response has essentially been adopted by the ALJ, the MSPB, and the Justice Department.

(1) There is insufficient evidence of intent to mislead. Raymond v. Department of Army, 34 MSPR 478 (1987); Waddell v. U.S. Postal Service, 31 MSPR

80 (1986). The knew or should have known standard employed by the ALJ, the MSPB, and the Justice Department is the incorrect standard. The U.S. Army bore the burden of proof of a willful attempt to deceive.

(2) Further, the question did not ask respondent to list all **PRIOR "GENERAL MISCONDUCT"**. Obviously if it had been stated in those terms Petitioner would have listed the DLA suspension.

(3) Additionally if one question asking Petitioner to list all **PRIOR "GENERAL MISCONDUCT"** would have been sufficient to cover everything as the agency asserts on page 18 of their Response (Aug. 21, 1989) to Petitioner's Petition for Review (Jul. 31, 1989), then why the need for all the multiple subparts (eight subparts altogether) to this question?

(4) Furthermore, the U.S. Army in their

Response (Aug. 21, 1989) to Petitioner's Petition for Review (Jul. 31, 1989) advances another stealth instruction/notice that Petitioner **"SHOULD HAVE CONSIDERED THE QUESTION "IN THE CONTEXT OF PREVIOUS AND SUBSEQUENT QUESTION"** yet fails to identify how and what in previous and subsequent context changes, modifies, or clarifies the actual language in the question. The U.S. Army simply asserts; and this really is the entire crux of the Army's argument, that Petitioner should have "**UNDERSTOOD**" that their stealth requirement was to list all **PRIOR "GENERAL MISCONDUCT".**

(5) The bottom line is that Petitioner read the question and saw nothing in the context of previous and subsequent questions that changed, amended, or clarified in any way the actual language contained in the question.

For the Supreme Court of the United States to now allow, after Petitioner's MSPB hearing, any of these blatantly prejudicial, ex post facto, manufactured interpretations, definitions, instructions, rules, and notices to have any bearing whatsoever on the truthfulness of Petitioner's answer to question 5d on the 29-R form; would be a violation of Petitioner's procedural due process rights of discovery and confrontation on this newly produced information by the agency in their Response (Aug. 21, 1989) to Petitioner's Petition for Review (Jul. 31, 1989).

III.

THE U.S. ARMY'S ADVERSE ACTION WAS TAKEN IN RETALIATION AGAINST PETITIONER'S WHISTLEBLOWING ACTIVITIES AND CONSTITUTES A PROHIBITED PERSONNEL PRACTICE UNDER 5 USC § 2302.

Introduction

5 USC § 2302 (b) 8 (a) in pertinent part states:

> "Any [government agency] employee who has authority to take, direct others to take, recommend or approve any personnel action, shall not ... take or fail to take a personnel action with respect to any employee or applicant for employment as a reprisal for a disclosure of information by employee or applicant which the employee or applicant reasonably believes evidences (ii) mismanagement, a gross waste of funds, an abuse of authority . . "

A government employee transgressing these code sections has committed a prohibited personnel practice.

A. <u>In the matter that the U.S. Army committed a prohibited personnel practice by removing Petitioner for making protected disclosures as a "Whistleblower"</u>.

The record is clear and the ALJ found that Petitioner was very vocal in exposing waste and abuse of authority in his position as a PA & T Quality Assurance representative. He strongly criticized the contractor and government alike.

The ALJ, clearly found that Petitioner made

protected disclosures (not just on the Ultrasystems contract) of waste, fraud, and mismanagement which were known to the proposing official, (Mr. Biasotti) which under the circumstances, could permit a finding that the adverse action was taken in retaliation for the protected disclosures. In fact the ALJ and the MSPB found that Petitioner met three of the four elements of a valid "whistleblowing" defense. The ALJ found however, that in the final analysis, there was no nexus between the protected disclosures and the adverse action because he found that the agency would have taken the action in any event. In this case the evidence of Petitioner's criticism (all found to be valid) is overwhelming. **The law requires that a balancing test be applied to THE FACTS in order to assess the existence of a nexus as there rarely is a "smoking gun".** The balancing test involves weighing the gravity of the charges against the intensity of the officials' motive. Consideration of the gravity of the

offense necessarily requires assessing the seriousness of the charges as well as the **quality and source of the evidence.** In this case the seriousness of the charges are de minimis given the lack of proof of any real or potential attempt to further a private gain. The quality of the direct evidence is weakened by Mr. Jackson's failure to contemporaneously record his recollection of the phonecon, his failure to report this telephone call to his supervisors as a significant event, and the fact that his first documentation of the phonecon is his initialing of memos (three months later) drafted by agency officials (Hettman and Trimbur) of whom Petitioner was very critical in his reports on the progress of the Ultrasystems contract, and who had reasons to have Petitioner removed from the government oversight position he held.

In this case, the evidence of the intensity of Mr. Biasotti's motives is clear; in the course of six (6) months before the proposed removal, Mr. Biasotti (the proposing official):

(1) Was embarrassed by Petitioner's accurate assessment of his rights under the Frequent Flyer program which he had attempted to coerce upon Petitioner with threats of FBI and other investigations;

(2) Was confronted by Petitioner over personal leave policies;

(3) Asked Petitioner's supervisor from 1987 to manufacture documentation alleging problems which existed a year earlier which Mr. Cooper (the supervisor) described finally as nothing more than a personality conflict;

(4) Knew, and concurred with, Petitioner's supervisor issuing a counselling memorandum over a non-written policy which Petitioner had not been given prior notice of (either oral or written notice) according to the supervisor himself.

(5) Issued a counselling memorandum to Petitioner about allegedly violating

security regulations (the regulations weren't even circulated until four weeks later); and

(6) Was the subject of two (2) grievances filed by Petitioner which were taken to USACARA.

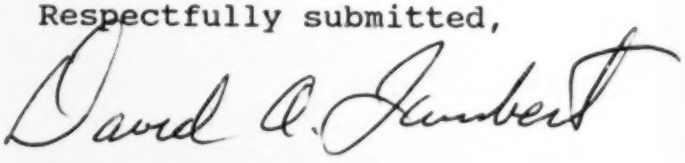
The cases require that this motive be balanced against the gravity of the charges. Sullivan v. Department of the Navy, 720 F.2d 1266 (Fed. Cir. 1983); Warren v. Department of the Army, 804 F.2d 654 (Fed. Cir. 1986). Petitioner submits that the Jackson/Lambert telephone call was manufactured. There is no evidence of personal gain (actual or attempted) which is conceded by Mr. Biasotti and the MSPB. The proposition that Petitioner sought to enhance the interests of Ultrasystems is preposterous. In fact three separate memos by Petitioner (Apr.13, 1988; Apr.18. 1988; and his MFR of Jun.30,1988) both before and after the June 10, 1988 phonecon unquestionably show Petitioner was aggressively attempting to

protect the interests of the government and the American taxpayer, quite to the detriment of Ultrasystems. In fact Ultrasystems already knew about its right to file equitable adjustment claims. In fact Ultrasystems had already filed one claim, before Petitioner became involved with the contract, over the government's late delivery of technical manuals. The issue of listing the 1983 suspension likewise is not of such intensity to override the motive Mr. Biasotti clearly had in getting rid of Petitioner.

CONCLUSION

For the foregoing reasons, the petitioner respectfully prays that a writ of certiorari issue in this case.

Respectfully submitted,



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Pro Se Petitioner

APPENDIX A

UNITED STATES OF AMERICA
MERIT SYSTEM PROTECTION BOARD

DAVID A. LAMBERT, Appellant,	)	DOCKET NUMBER PH07528910212
DEPARTMENT OF THE ARMY, Agency.	)	DATE: APR 27 1990

Bernard J. DiMuro, Esquire, Alexandria, Virginia, for the appellant.

Christopher N. Patterson, Esquire, Warrenton, Virginia, for the agency.

BEFORE

Daniel R. Levinson, Chairman

Maria L. Johnson, Vice Chairman

OPINION AND ORDER

This case is before the Board upon the appellant's petition for review of the June 23, 1989 initial decision that sustained his removal. For the reasons discussed in this

Opinion and Order, the Board DENIES the appellant's petition because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. The Board REOPENS this case on its own motion under 5 C.F.R. § 1201.117, however, and AFFIRMS the initial decision as MODIFIED by this Opinion and Order, still SUSTAINING the appellant's removal.

BACKGROUND

The Agency's Charges

The appellant appealed to the Board's Philadelphia Regional Office from the agency's action removing him from the position of General Engineer, GS-12, at the Vint Hill Farms Station in Warrenton, Virginia. The agency initially proposed the appellant's removal on September 23, 1988, based on the charge of failure to observe written regulations (the first charge) in advising Timothy Jackson, an official with Ultrasystems, Inc., a private contractor, that the government was at fault in providing contractual documentation untimely and that the

contractor should seek compensation for any "schedule impacts" that resulted from the alleged late delivery of the documentation. See Initial Appeals File (IAF) at Tab 5, Subtab 4f. The agency alleged that the appellant's conduct violated Army Regulation, AR 600-50, and Office of Personnel Management (OPM) regulations at 5 C.F.R. Part 735.[1] The agency also considered a

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[1] Specifically, the agency charged the appellant with violating AR 600-50, para. 1-4, which provides in pertinent part as follows:

> c. DA personnel place loyalty to country, ethical principals, and law above private gain and other interests. DA personnel will not make or recommend any expenditure of funds or take or recommend any action known or believed to be in violation of U.S. laws, Executive Orders, or applicable directives, instructions, or regulations.
>
> ....
>
> f. DA personnel will avoid any action, whether or not specifically prohibited by this regulation, that might result in, or reasonably be expected to create the appearance of --
>
> ....
>
> (3) Impeding Government efficiency or economy.

5-day suspension that the appellant received in

IAF at Tab 5, Subtabs 4f, 4s.

As to OPM's regulations, 5 C.F.R. § 735.201a provides follows:

> An employee shall avoid any action, whether or not specifically prohibited by this subpart, which might result in, or create the appearance of:
>
> (a) Using public office for private gain;
> (b) Giving preferential treatment to any person;
> (c) Impeding Government efficiency or economy;
> (d) Losing complete independence or impartiality;
> (e) Making a Government decision outside official channels; or
> (f) Affecting adversely the confidence of the public in the integrity of the Government.

The agency also alleged that AR 600-50, as well as 5 C.F.R. §§ 735.206 and 735.209:

> prohibits an employee from engaging in "conduct prejudicial to the Government" and prohibits an employee, having knowledge of information gained from his or her official Government position and not made available to the public, from "using that information to further a private interest."

IAF at Tab 5, Subtab 4f (original emphasis).

1983 for "defiance of constituted authority and disregarding regulations." IAF at Tab 5, Subtab 4f.

Subsequently, after considering the appellant's written reply, and his oral reply, in which he requested that the agency examine the circumstances under which his security clearance had been suspended, the agency, on November 22, 1988, amended the notice of proposed removal. The amended notice added a second charge, i.e., answering falsely on two 1987 employment application forms to the question of whether, since the time he had signed his qualifications statement (or application) for this employment, he had quit a job after being informed that his employer intended to fire him for any reason. The agency alleged that the appellant represented that he left his employment with ERI Corporation (ERI) in 1987 after a dispute in which he refused to work overtime in order to attend his dying dog. The agency stated that, to the contrary, the

appellant was given a notice of termination when, using profanity, he refused to work overtime because he had not been paid for previous overtime work. IAF at Tab 5, Subtab 4c.

The agency also added a third charge, i.e., failure to provide relevant and material information on a 1987 security clearance application form. This charge was supported by three specifications related to the appellant's failure to list (a) a 5-day suspension he received in 1983, while he was employed with the Defense Logistics Agency, (b) a 1987 notice of termination of employment from ERI, and (c) a conviction for speeding he received in 1986. *Id.* Tab 5, Subtab 4c. The agency removed the appellant, based on all of the charges and their underlying specifications, effective February 8, 1989. *Id.*at Subtab a.

The Appellant's Appeal

On appeal, the appellant challenged the agency's action as unsupported by the evidence. He contended that, because he had entered into

a settlement agreement with ERI that precluded him from listing the circumstances of his termination from that company, he was not required to include information regarding the termination in his answers on his employment application forms. He also alleged that his failure to include the speeding conviction on the security clearance application form was inadvertent. Additionally, he alleged various affirmative defenses, including harmful errors and reprisal for whistleblowing activities. See *Id.* at Tab 1.

The Administrative Judges's Findings

The administrative judge sustained the appellant's removal, after finding the first and third charges supported by preponderant evidence. With respect to the first charge, failure to follow written regulations, the administrative judge, relying on *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458

(1987),[2] considered the witnesses' demeanor and supporting documentary evidence and found that private contractor Jackson's testimony in support of those charges was more credible than the appellant's testimony to the contrary. *See* Initial Decision at 5-11.

As to the second charge, making a false statement on the two 1987 employment application forms, the administrative judge found that the agency failed to prove this charge under *Naekel v. Department of Transportation*, 782 F.2d 975, 977 (Fed. Cir. 1986), which requires that the agency prove by preponderant evidence that the

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[2] *Hillen* requires that, in explaining a credibility determination, an administrative judge must consider the following factors: (1) The witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) the witness's bias or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor. *Hillen*, 35 M.S.P.R. at 458.

appellant knowingly supplied wrong information with the intent of defrauding the agency. The administrative judge found that the appellant was not obligated to disclose the details of the dispute with ERI because of a settlement agreement which, inter alia, precluded the mention of the dispute in future references. Further, the administrative judge noted that, while the appellant did not provide all of the details of the circumstances surrounding his termination of employment with ERI, the information he provided was sufficient to put the agency on notice in the event it required additional details. Therefore the administrative judge did not sustain this charge. *Id.* at 11-12.

With respect to the third charge, failure to provide relevant and material information on a security clearance application form, the administrative judge sustained the specification that the appellant improperly failed to mention the 1983 5-day suspension he received. He found

no merit to the appellant's contention that a suspension is not a reprimand, noting that the appellant was aware of the need for truthfulness in his answers, as explained to him by the agency's security officer who interviewed him, and that, although the appellant was given the opportunity to provide additional information, he failed to do so. *Id.* at 12-13.

As to the appellant's failure to list his termination from ERI, the administrative judge did not sustain that specification. He found that the appellant was not required to list that termination because, under the terms of the settlement agreement, the appellant resigned and his record was cleared.

The administrative judge also did not sustain the specification regarding the 1986 speeding conviction. He noted that the appellant had disclosed an arrest for assault and had listed five other traffic violations that occurred between 1982 and 1984. Thus, he found that the appellant's claim of inadvertence was credible.

Id. at 14.

With respect to the appellant's affirmative defenses, the administrative judge found that the appellant failed to meet all of the requirements set out in *Warren v. Department of the Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986),[3] for proving that the agency's action was taken in reprisal for his whistleblowing activities in allegedly exposing waste and abuse of authority by the proposing official, and his criticism of Ultrasystems and the government. The administrative judge found that (a) the appellant showed that he had engaged in protected activities, (b) the proposing official

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[3] Under *Warren*, 804 F.2d at 656-58, in order for appellant to prevail on a contention of illegal retaliation, he has the burden of showing that: (1) A protected disclosure was made; (2) the accused official knew of the disclosure; (3) the adverse action under review could, under the circumstances, have been retaliation; (4) there was a genuine nexus between the alleged retaliation and the adverse action.

knew of some of the protected disclosures, and (c) because the proposing official was the object of some of the disclosures, the charges of falsification that were added by the proposing official could have been retaliatory. The administrative judge, found, however, that retaliation was not a significant factor in the taking of the adverse action because the agency would have taken the action absent the appellant's protected conduct. He noted it was the disclosure of the appellant's improper statements to the private contractor and the appellant's failure to provide relevant and material information on the security clearance application form, which were unrelated to his protected disclosures, that prompted the agency to initiate the adverse action. Initial Decision at 14-18. Thus, he found that the appellant did not prove his affirmative defense of reprisal.

As to appellant's allegation of harmful error, the administrative judge found that the appellant did not show that prohibited ex parte

communication occurred between counsel for the agency and the deciding officials in clarifying the issues concerned, because the Board held in *Anderson v. Department of State*, 27 M.S.P.R. 344, 348 (1985), *aff'd*, 790 F.2d 91 (Fed. Cir. 1986) (Table), that there is no statutory or regulatory prohibition on ex parte communications between such agency officials. The administrative judge noted that, moreover, the appellant did not show that the contacts involved the transmission of new information or that consideration of this information impaired his ability to defend against the agency's action. Also, the administrative judge found no harmful error in the former agency's representative's examination of the appellant's pre-employment documents subsequent to the appellant's oral reply to the original proposal notice. Initial Decision at 18-21.

Finally, the administrative judge found that the action promoted the efficiency of the service and that the penalty of removal was

appropriate in light of (a) the seriousness of the sustained charges of failure to follow written instructions and failure to provide relevant and material information on the security clearance application form, (b) the appellant's short tenure (less than 3 years) with the agency, and (c) the effect of his offense on his ability to perform his duties, inasmuch as his position was one of trust and independence.[4] *Id.* at 21-24.

[4] In finding that the penalty of removal was appropriate, the administrative judge did not consider the prior suspension in 1983 because he found that it did not meet all of the requirements of *Bolling v. Department of the Air Force*, 9 M.S.P.R. 335, 339-40 (1981) (the Boards review of a prior disciplinary action is limited to determining whether that action is clearly erroneous where the employee was informed of the action in writing, he was given an opportunity to dispute it to a different authority, and it was made a matter of record).

The administrative judge considered, however, that in assessing the penalty, the agency's deciding official relied on two memoranda of counselling that the appellant had previously received -- on July 11, 1988, for distributing a memorandum without first obtaining supervisory approval, and on August 30, 1988, for discussing agency program matters in a public place. *See* Initial Decision at 17, 23; IAF at Tab 43, Agency's Exhibits 24 and 25.

The Appellant's Petition for Review

In his petition for review, the appellant contends that: (1) The administrative judge erred in sustaining two of the charges; (2) the administrative judge improperly analyzed the whistleblower claim; (3) the administrative judge was biased against him; and (4) the penalty of removal was unreasonable.[5]

The agency has responded in opposition to the petition for review and has challenged the administrative judge's finding that, because of the settlement agreement with ERI, the appellant was not obligated to disclose the circumstances of his termination with that company.

1. The administrative judge did nor err in finding two of the charges sustained.

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[5] The appellant has also submitted a motion to strike Agency Exhibit # 40 which was submitted below. The agency has responded, challenging the motion. Since the appellant's motion was filed on November 29, 1989, beyond the deadline set forth in the Board's notice dated August 3, 1989, and the appellant has not shown that his motion is based on new and material evidence, we will not consider it. *See* 5 C.F.R. § 1201.114 (i).

With respect to the charge of failure to observe written regulations in regard to his statements to private contractor Jackson, the appellant contends that this charge should not be sustained because, in the approximately 4 months prior to bringing the charge, the agency did not ask him to respond to Jackson's version of their telephone conversation. He asserts that the agency had no documentation to support the allegation of improper comments until 1 month after they were allegedly made and that documentation was based on hearsay statement's by Michael Hettmann, the agency's project leader, of whom the appellant had been critical. The appellant also argues that Hettmann, as well as the agency's contracting officer, Robert Trimbur, and Jackson had ulterior motives in having him removed because the appellant's quality assurance efforts and criticism reflected adversely on those individuals and on Ultrasystems. *See* Petition for Review at 6-7.

The appellant has cited no agency regulation

or other authority that required the agency to afford him an opportunity to respond to Jackson's statements prior to initiating the adverse action or that prohibited the agency from relying on hearsay in initiating the adverse action. The agency also supported its charge before the administrative judge with evidence consisting of Jackson's affidavit regarding the appellant's statements, *See* IAF at Tab 5, Subtab 4i, as well as Jackson's testimony. Further, even if Hettmann, Trimbur, and Jackson had ulterior motives in wanting to have the appellant removed, none of these individuals was involved in taking the removal action against the appellant. Therefore, the appellant has not shown that the administrative judge erred in sustaining this charge.

The appellant also contends that the administrative judge improperly assessed the credibility of the witnesses. He contends that the administrative judge should have found his testimony more credible than Jackson's because:

(1) Jackson's testimony was "equivocal," and his memory was faulty; (2) the appellant's testimony was more persuasive than Hettmann's memorandum and Trimbur's corrected memorandum; (3) the administrative judge failed to explain how the appellant's June 30 1988 memorandum that was attached to his written reply to the charges was inconsistent with his testimony; (4) the fact that the appellant's June 10, 1988 memorandum did not refer to the June 10 telephone call to Jackson did not reflect adversely on the credibility because the June 30 memorandum focused on the substance of the contract itself and not on the telephone call. *See* Petition for Review at 8-9.

In considering challenges to an administrative judge's credibility findings, the Board must give due deference to those findings. *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (*per curiam*). *See* also *Jackson v. Veterans Administration*, 768 F.2d 1325, 1331

(Fed. Cir. 1985) (special deference must necessarily be given to the administrative judge's findings regarding credibility where those findings are based on the demeanor of witnesses).

The appellant has shown no basis for disturbing the administrative judges's credibility determinations. The administrative judge considered the credibility of both the appellant and Jackson as to whether the appellant made the alleged statements in his telephone call. The administrative judge found that Jackson's testimony was more credible than the appellant's denial. In this regard, the administrative judge noted that Jackson was forthright in his testimony, which was consistent with his affidavit. The administrative judge found the appellant's testimony not credible because the appellant failed to state in his response to the charges that he called Jackson merely to discuss his need for aperture cards for use in a June 30,

1988 memorandum, which did not refer to the appellant's telephone conversation with Jackson.

The administrative judge further noted that, on cross examination, the appellant appeared uncomfortable and confused, particularly when questioned about his completion of the security forms and his prior employment terminations, and that his memory appeared selective. Thus, the administrative judge concluded that the appellant's statements to Jackson violated AR 600-50 and that the appellant used his position to further a private interest. Further, the administrative judge explained that nothing in appellant's June 30 memorandum supported the appellant's allegation that he called Jackson in order to discuss aperture cards that he needed for his project. *See* Initial Decision at 5-11. We find that the administrative judge properly considered these credibility issues. *See Jackson*, 768 F.2d at 1331; *Hillen*, 35 M.S.P.R. at 458; *Weaver*, 2 M.S.P.R. at 133.

The appellant contends further that the

5 USC § 2302 (b) 8 (a) in pertinent part

states:

"Any [government agency] employee who has authority to take, direct others to take, recommend or approve any personnel action, shall not ... take or fail to take a personnel action with respect to any employee or applicant for employment as a reprisal for a disclosure of information by employee or applicant which the employee or applicant reasonably believes evidences (ii) mismanagement, a gross waste of funds, an abuse of authority . . "

U.S. Army Regulation (AR) 380-67, Chapter 2,

paragraph 2-308 states:

"The subject of a personnel security investigation is the best source of accurate and relevant information concerning the matters under consideration". **Further: "restrictions imposed by the PRIVACY ACT OF 1974 DICTATE that Federal Investigative Agencies collect information to the greatest extent practicable directly from the subject".**

U.S. Army Regulation (AR) 380-67, Chapter 2,

paragraph 2-400 states:

"The DIS provides a single centrally directed personnel security investigative service to conduct personnel security investigations within the 50 states". Further: **"NO OTHER DOD component shall conduct personnel security investigations unless specifically authorized by the Deputy Under Secretary of Defense for Policy".**

APPENDIX C

Amendment IV of the Constitution of the United States:

"The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, **shall not be violated**, and no Warrants shall issue, but for reasonable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

Amendment V of The Constitution of the United States:

"No person shall be held to answer for a capital, or otherwise infamous crime, except in cases arising in the land or naval forces, or in the Militia, when in actual service in of War or public danger; nor shall any person be subject for same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law**; nor shall private property be taken for public use, without just compensation."

Federal Law 5 USC § 552a, "The Privacy Act of 1974" paragraph (b) in pertinent part states:

"No agency shall disclose any record which is contained in a system of records by **any** means of communication to any person, or to another agency, **except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains**".

APPENDIX B

Note: Pursuant to Fed. Cir. R. 47.8, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

90-3383

DAVID A. LAMBERT,

Petitioner,

v.

DEPARTMENT OF THE ARMY,

Respondent.

JUDGEMENT

ON APPEAL from the MERIT SYSTEMS PROTECTION BOARD

in CASE NO(S). PH07528910212

This CAUSE having been considered, it is ORDERED and ADJUDGED: Per Curiam (MARKEY, Circuit Judge, COWEN, Senior CIRCUIT JUDGE, and RADER, Circuit Judge):

AFFIRMED. See Fed. CIR. R. 36.

ENTER BY ORDER OF THE COURT

DATED FEB 6 1991 Francis X. Gindhart, Clerk

FOR THE BOARD:

Washington, D.C.

Robert E. Taylor
Clerk of the Board

Transportation, 5 M.S.P.R. 12, 13 (1981) (the Board will not consider issues that are raised in the response to a petition for review but were not raised in the petition for review).

ORDER

This is the Board's final order in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

determining the reasonableness of the agency-imposed penalty. See Kehrier v. Department of Justice, 27 M.S.P.R. 477, 480 (1985). We find that the administrative judge correctly considered the appropriateness of the penalty, and we agree the removal was within the bounds of reasonableness.

5. We will not consider the agency's allegation of error by the administrative judge in regard to the appellant's settlement agreement with ERI.

The agency contends in its response to the petition for review that the administrative judge erred in finding that the appellant was not obligated to disclose the circumstances of the termination of his employment with ERI in light of the settlement agreement. See Agency's Response to Petition for Review at 23-26. Since, however, the agency did not raise this issue within the context of a petition for review or a cross petition for review, the Board will not consider it. See, e.g., Jackson v. Department of

in a proposal notice, solely for the purpose of consider past discipline, which was not alleged Subtab 4a. Moreover, an administrative Judge may final decision to remove him. See IAF at Tab 5, notice, and the agency considered them in its in his reply to the original removal proposal who raised the issue of these prior counsellings removal proposal notices, it was the appellant memoranda in either its original or its amended while the agency did not refer to these Board that they were clearly erroneous. Further, "contrived" is insufficient to convince the bare allegation that the memoranda were 43, Agency's Exhibits 24 and 25. The appellant's were made a part of the record. See IAF at Tab a different authority, and (c) the memoranda to opportunity to, and did prieve, the memoranda to counselled in writing, (b) he was given an requirements since (a) the appellant was that these memoranda satisfied the Bolling Petition for Review at 14. We find, however, alleging, merely, that they were "contrived."

disrespectful to authority. Id. The initial decision shows that the administrative judge made these statements within the context of analyzing the appellant's allegation of reprisal. These statements, however, are not inherently biased. See Biberstine v. Department of Defense Dependents Schools. 37 M.S.P.R. 248, 256 (1988); and Oliver v. Department of Transportation, 1 M.S.P.R. 382, 386 (1980) (in making a claim of bias or prejudice against an administrative judge, a party must overcome the presumption of honesty and integrity that accompanies administrative adjudicators). The record shows that the administrative judge fully and impartially considered the charges against the appellant, sustaining two of the three charges. Thus, we find no merit to the appellant's contention of bias by the administrative judge.

4. The penalty of removal was reasonable.

The appellant argues that the two memoranda of counselling should not be considered,

he cited any authority that prohibited the agency from using information that was more than 90-days or 1 year old as the basis for an adverse action. See, e.g., Mauro v. Department of the Navy, 35 M.S.P.R. 86, 94 (1987) (there was no basis to dismiss misconduct over 3 years old absent a showing that the agency's delay was unreasonable or that the delay prejudiced the appellant's rights). Therefore, he has shown no basis for disturbing the administrative judge's findings on the affirmative defense of reprisal.

3. The appellant has not shown bias by the administrative judge.

The appellant apparently contends that the administrative judge was biased against him, see Petition for Review at 2, based on his statement that the "[a]ppellant is a gadfly who, in his memos, was critical of Ultrasystems, his co-workers and his employer." Initial Decision at 17. The administrative judge further noted that, notwithstanding the fact that the appellant had disclosed possible waste, he was

the reprisal issue, the Board must consider that the proposing official relied on information that was more than 1 year old in support of the adverse action. He states that the agency had issued him a memorandum of counselling for distributing the June 30 memorandum but that the policy against distribution had never been communicated to him.[6] He also states that the proposing official issued him a memorandum of counselling almost 90 day after he mentioned the name of a project at a luncheon meeting in the presence of individuals who had security clearance to discuss that information.[7] Petition for Review at 13-14.

The appellant has not pointed to any evidence of record to support his allegation that he had not been informed of the agency's policy regarding the distribution of memoranda. Nor has

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[6] See footnote 4, supra.

[7] See id.

error by the administrative judge in sustaining this charge.

The appellant also contends that the administrative judge improperly relied on testimony regarding his reasons for leaving his prior employment at ERI even though the administrative judge resolved those matters in the appellant's favor. See Petition for Review at 10-11. The administrative judge, however, merely considered the appellant's demeanor during cross examination on his prior terminations in assessing his credibility. The administrative judge did not sustain any specifications that related to the appellant's failure to report all of the details of his settlement with ERI. See Initial Decision at 11-12. Therefore, the appellant has not shown error by the administrative judge in this regard.

2. The appellant failed to prove that the action was taken against him in reprisal for his whistleblowing activities.

The appellant contends that, in considering

that is not prejudicial to a party's substantive rights does not warrant reversal of the initial decision based on that error).

As to the charge that he failed to provide relevant and material information on the security clearance application form, the appellant repeats his contention that the question on the form that asked whether he had ever received any written reprimands or unsatisfactory efficiency reports does not relate to a suspension. Petition for Review at 11. We find it implausible that the appellant could believe that a 1983 suspension he received while employed by the Defense Logistics Agency would not be included within this context. As the administrative judge noted, although the agency's security officer specifically impressed upon the appellant the importance of truthfully answering the questions on the form and allowed him an opportunity to seek clarification, the appellant failed to do so. See Initial Decision at 13. Therefore, the appellant has not shown

(an administrative judge's adjudicatory error of the Air Force, 22 M.S.P.R. 281, 282 (1984) supports this charge. See Panter v. Department of Transportation, 22 M.S.P.R. 390, 392 (1984). Nevertheless, the appellant has not shown that he was harmed by the administrative judge's statement because the preponderance of evidence of record establishes that the appellant was charged only with furthering a private interest, in this case, the interest of Ultrasystems. Therefore, we find that the administrative judge erred in this regard.

On petition for review, the appellant argues that the administrative judge erred in finding that the appellant was motivated by personal gain. Petition for Review at 11. The administrative judge stated that, to show that the appellant used his position to further a private interest, "the agency need show only that an appellant [sic] position was used with the purpose of obtaining personal gain, not that any actual gain was acquired." Initial Decision at 11. We find that the administrative judge had no basis on which to find that the appellant used his position to obtain a personal gain. The appellant was charged only with furthering a private interest, in this case, the interest of